National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

June 30,1989

TO: Robert H. Miller, Regional Director, Region 20 THRU: Thomas W. Cestare, Officer-in-Charge, Subregion 37

FROM: Harold J. Datz, Associate General Counsel, Division of Advice

SUBJECT: Carpenters Union, Local 745 (Ohbayashi Hawaii Corporation) Case 37-CE-13

584-1225-2500, 584-1250-5000, 584-2588, 584-5000

This case was submitted for advice as to whether a union's pursuit of a grievance violated Section 8(e).

FACTS

Ohbayashi Corporation (the Employer) is a Japanese corporation that has been licensed to do business in Hawaii since 1969. Its articles of incorporation state that the purpose of the corporation is, inter alia, to engage in contracting, planning, designing and supervision of construction work. However, the Employer has not performed any construction work in Hawaii since 1979. Before 1979, the Employer hired local general contractors who, in turn, hired all necessary subcontractors without any control by or interference from the Employer. The Employer has only one employee in Hawaii. Nonetheless, the Employer has been signatory to the General Contractors Labor Agreement (the GCLA or the Agreement). On March 10, 1988, outside the Section 10(b) period, the Employer signed the current Agreement.1 The agreement includes, at Section 25.B, the following provision:

Subcontracting of Other Work Not Covered By This Agreement

The Contractor shall subcontract work that he does not perform with his own forces only to a subcontractor who is signatory to a collective bargaining agreement with a union which has jurisdiction over the work involved OR which is certified by the National Labor Relations Board as the certified bargaining representative of the employees of said subcontractor; provided, however, that the Contractor puts the work out to bid and receives three or more responsive bids from responsible unionized Specialty Contractors covering said work. Provided further that, in the event that the Contractor does not put said work out to bid then said work must be assigned to a unionized Contractor.

O.H.C. (the Charging Party) is a wholly owned subsidiary of the Employer.2 in the business of real estate development and hotel ownership. It was incorporated in Hawaii in 1972. Since that time, it has contracted out all construction work to both union and non-union contractors. O.H.C. has never been signatory to any collective bargaining agreements. No O.H.C. employees work on any sites. The general contractors have total control over their own employees and the subcontractors.

O.H.C. is currently developing a condominium complex known as Masters at Kaanapali on the Island of Maui. Phase A, which is now completed, was built by Pan Pacific Construction, a general contractor which had collective bargaining agreements with various construction unions. The bid for the Phase B construction was won by JDH, a non-union general contractor which has no collective bargaining agreements with any labor organization. General on-site supervision at the Masters at Kannapali site is by Architects Hawaii. The O.H.C. project manager occasionally meets with Architects Hawaii, but not with JDH.

On March 8, 1989, the Union filed a grievance against the Employer alleging that it had violated Section 25.B of the Agreement by subcontracting construction work to non-union JDH. Pursuant to the grievance procedure in the GCLA, the grievance was submitted to the State Joint Board, which is composed of Union and management representatives. The Employer contended that O.H.C., not the Employer, had the contract with JDH for the Masters of Kaanapali project. However, the Joint Board upheld the Union's grievance. The decision of the Joint Board is final and binding on the parties to the Agreement. The Employer has brought an action in U.S. District Court to vacate the Joint Board decision.

ACTION

A Section 8(e) complaint should issue, absent settlement.

The instant clause binds the Employer to a "union-signatory" subcontracting clause. To this extent, the clause may be lawful, for the Employer is engaged in the construction industry and the clause is an onsite clause.3 However, as applied by the Joint Board, the clause requires O.H.C. to adhere to the "union-signatory" subcontracting clause.4 O.H.C. is not a construction industry employer and is not a single employer with the Employer. Hence, the 8(e) proviso does not protect the clause insofar as it applies to O.H.C., a non-construction company. And, since the clause was bilaterally affirmed within the 10(b) period, a violation of 8(e) has been established. 5

H.J.D.

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1 Although there is a question concerning whether the signer of the contract was an agent of the Employer, no party contends the contrary.

2 The Region has concluded that O.H.C. is not a single employer with or alter ego of the Employer

3 We need not pass on the issue of whether the 8(e) proviso protects an agreement between a union and a construction company that does not intend to employ any construction employees.

4 We regard the Joint Board decision as the functional equivalent of an arbitral body. In this regard, we note that its findings are final and binding. Hence, the award represents a bilateral affirmation of the application of the clause to O.H.C.

5 The instant clause is not technically a Manganaro clause. The instant clause is a union-signatory subcontracting clause, whereas the Manganaro clause expressly requires the signatory company to apply the clause to related companies. The instant clause is unlawful because it applies the union-signatory requirement to a non-construction employer.